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SUPREME COURT U S

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950.

No. 258

DEAN MILK COMPANY, a corporation,
Appellant,

vs.

CITY OF MADISON, WISCONSIN, a Municipal Corporation, DR. C. K. KINCAID, as Health Commissioner for the City of Madison, Wisconsin, LEONARD HOWELL, as City Manager of the City of Madison, Wisconsin, and THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN,
Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

REPLY TO APPELLEES' STATEMENT IN OPPOSITION TO JURISDICTION.

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REPLY TO APPELLEES' STATEMENT IN OPPOSITION TO JURISDICTION.

May It Please the Court:

I.

The Fact that Dean Milk Company Sells Its Milk Through Distributors Does Not Deprive It of Its Constitutional Rights.

On page eight of appellees' statement in opposition to appellant's statement of jurisdiction and motion to dismiss or affirm is contained the following statement:

"The Dean Milk Company does not transport milk to or sell milk in the City of Madison or Dane County, nor does it propose to. It sells bottled, pasteurized milk to Robert Alder at Chamung, Illinois. Robert Alder transports the milk in his own refrigerated truck and sells it to stores in Wisconsin, including various communities in Dane County (R. p. 103)."

This same contention was made, and rejected by this Court in the case of *Savage* v. *Jones*, 225 U. S. 501, 32 Sup. Ct. 715, at page 720, where it is stated:

"It is said that the complainant is not entitled to invoke the constitutional protection, in that he fails to show injury. * * * The argument rests upon the averment in the bill that his sales were made at Minneapolis, the goods 'to be delivered free on board of cars' at that point, 'and delivered to purchasers and consumers within the state of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers.' In answer, it must again be said that 'commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' * * * It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another state. His product manufactured in Minnesota was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages. * * * An attack upon this right of the importing purchasers to sell in the original packages bought from the complainant not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales.

—a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the state chemist had threatened the complainant that, in default of such compliance, he would cause the arrest and prosecution of every person dealing in the article within the state, and had distributed broadcast throughout the state warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief against enforcement by the defendant of the illegal demands."

No contention was made in either the trial court or the Supreme Court of the State of Wisconsin that the method by which the Dean Milk Company distributed and sold its milk deprived it of the constitutional guarantees.

The record at 103-104 shows that the milk proposed to be sold in Madison is delivered in the original packages as it leaves the Dean plant at Chemung, Illinois. It was the Dean Milk Company that applied for a license to sell its milk and milk products in the City of Madison, Wisconsin, and it was denied a license on the ground that its milk was not pasteurized within five miles, as provided by Sec. 7.21 of the Madison Ordinance, and that its milk was not produced on farms located within twenty-five miles, as provided by Sec. 7.11 of the Madison Ordinance.

We contend that the method by which the Dean Milk Company sells its milk is immaterial. We contend that the Dean Milk Company has a constitutional right to sell its milk in Madison, Wisconsin, and it makes no difference whether it sells its milk directly or through distributors. The above case from this Court supports our contention.

II.

The Decision of the Wisconsin Supreme Court Appealed From Is Contrary to the Decisions from Other Courts.

Beginning on page sixteen of appellees' typewritten statement in opposition to jurisdiction, the appellees attempt to distinguish cases cited by appellant which show that similar ordinances have been held unconstitutional by the courts of other states. Notwithstanding the appellees' argument to the contrary, the Supreme Court of Wisconsin itself, in the case at bar, in 43 N.W. (2nd) at page 482, conceded that its decision is contrary to that of the courts of other states, wherein it stated:

> "The plaintiff contends that its inspection, with that of the Chicago Board of Health and spot checks by the United States Public Health Service, result in a product that is clean, pure and wholesome, and that it should be permitted to flow freely to market unburdened by duplication of inspection and that the restrictions in the Madison milk ordinance are prohibitive trade barriers and therefore unconstitutional under the Fourteenth Amendment and the Interstate Commerce Clause, art. 1, par. 8, cl. 3 of the United States Constitution. *The courts of some states have so held.* This court has held otherwise in *Dyer* v. *City Council of City of Beloit*, 250 Wis. 613, 27 N.W. 2d 733, in which it held valid an ordinance of the city of Beloit which contained the following provision: 'No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the city of Beloit.'"

It is respectfully submitted that this Court has jurisdiction of the appeal.

Respectfully submitted,

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